

N.D.A.G. Letter to Person (Feb. 26, 1988)

February 26, 1988

Mr. Alan Person
Executive Director
North Dakota Public Employees Retirement System
1930 Burnt Boat Drive
Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of February 17, 1988, in which you request my opinion on whether NDPERS may amend its administrative rules to permit an open enrollment for NDPERS members to repurchase prior service credit and purchase service credit for the time spent in the military or working for a governmental entity that did not participate in NDPERS.

At the outset, the distinction between repurchasing prior service credit and purchasing prior public service credit should be clarified. The repurchase of prior service credit contemplates that the individual had previously earned service credit with NDPERS and lost such service credit when he terminated employment with the state or a participating political subdivision. On the other hand, purchasing prior public service credit concerns a time period when the employee was not working with an entity participating in NDPERS. For example, members could be permitted to purchase service credit for time spent on a leave of absence, performing military service, or working for a governmental entity that did not participate in NDPERS. I will discuss the authority of NDPERS to promulgate administrative rules in these two separate areas.

N.D.C.C. § 54-52-02.6 provides for the repurchase of past service upon reemployment.

54-52-02.6. Repurchase of past service upon reemployment. An individual with at least eight years of service who terminates participation in the plan may elect to receive a refund of contributions and thus forfeit all rights to plan benefits and all rights to repurchase, for retirement purposes, that service. An individual who terminates with less than eight years of service, may, upon reemployment, repurchase past service in accordance with rules established by the board.

Additionally, N.D.C.C. § 54-52-19.2 permits members who withdrew from the predecessor plan to repurchase prior service credit by December 31, 1987.

Other than the above mentioned statutory provisions, there does not exist any authority for the repurchase of service credit. In accordance with N.D.C.C. § 54-52-02.6, it appears

that the NDPERS Board has full authority to establish rules for the repurchase of past service relative to members who terminated with less than eight years of service. It is my opinion, therefore, that the board may establish an open enrollment program for those individuals and establish rules by which they may repurchase past service credit.

The only statute that permits the purchase of public service credit is N.D.C.C. § 54-52-17.3 which allows members to purchase service credit for time spent serving as a member of the Legislative Assembly. In the absence of authorizing legislation, it is my opinion that administrative rules cannot be promulgated that would permit the purchase of prior public service credit. See generally N.D.C.C. § 28-32-02.

In the past, NDPERS has promulgated administrative rules permitting the purchase of public service credit. See N.D. Admin. Code § 71-02-03-01(3) (allowing the purchase of service credit for time spent on leave of absence) and § 71-02-03-02 (allowing the purchase of service credit for time spent performing military service). Although these rules are designed so that the retirement fund will not be actuarially impacted by such a purchase of credit, I have reservations whether they merely implement existing law rather than creating it. Therefore, I would recommend that appropriate enabling legislation be proposed that would expressly permit such a concept.

It is my opinion, therefore, that an open enrollment program permitting the purchase of prior public service credit is not authorized absent enabling legislation.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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